Docket No. 86-1533

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MARIE IANNELLI, a/k/a MARIE IANELLI,
a/k/a ANNA JANNELLI,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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May 18, 1987

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review petitioner's untimely filed petition.

2. Whether this Court has jurisdiction to review petitioner's claim that the state penal statute under which she was convicted is repugnant to the United States Constitution, where the highest state appeals court expressly declined to reach her federal constitutional claim on the ground that it had not been preserved for appellate review under established state procedural law.

3. Whether Section 240.21 of the New York Penal Law is unconstitutional under the First and Fourteenth Amendments to the United States Constitution.

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PRELIMINARY STATEMENT

Respondent, the State of New York, asks this Court to deny the petition for a writ of certiorari. The petition seeks review of a judgment of the Court of Appeals of the State of New York.

The Court of Appeals affirmed the judgment of the Supreme Court of the State of New York, Appellate Term, Second and Eleventh Judicial Districts, which had affirmed the judgment of the Criminal Court of the City of New York, County of Kings, convicting the petitioner, Marie Iannelli (hereinafter "defendant"), after a jury trial, of Aggravated Disorderly Conduct [N.Y. Penal Law § 240.21 (McKinney's 1980 and Supp. 1987)], and sentencing her to a Conditional Discharge.

OPINIONS BELOW

The judgment of the New York Court of Appeals has been officially reported at 69 N.Y.2d 684 (1986). The judgment of the New York Supreme Court, Appellate Term, Second and Eleventh Judicial Districts, has not been officially reported; it is reproduced in defendant's appendix.

JURISDICTION

This Court lacks jurisdiction to review defendant's petition because it is jurisidictionally out of time. The petition requests review of a judgment of the New York Court of Appeals that was rendered December 19, 1986. The petition was not filed until March 18, 1987, well after the expiration of the sixty-day limit on such filings prescribed by statute and this Court's rules. *See* 28 U.S.C. § 2101(d) (1982 and Supp. 1987); Sup. Ct. R. 20.1 (1984 and Supp. 1987). No extension of the sixty-day filing period was sought or obtained by defendant. The untimely petition should be dismissed.

Moreover, this Court lacks jurisdiction to review the subject matter of defendant's petition in any event because the federal constitutional issue she asserts was not properly raised and decided in the state courts below. Defendant failed to make a timely motion in the trial court to dismiss the misdemeanor information on constitutional grounds. Accordingly, the New York Court of Appeals expressly declined to reach defendant's constitutional claim, holding that it had not been preserved for that court's review under applicable state law. *See* 69 N.Y.2d at 685, *citing People v. Dozier*, 52 N.Y.2d 781, 783 (1981) *and People v. Thomas*, 50 N.Y.2d 467, 473 (1981); *see also* N.Y. Crim. Proc. Law § 470.05(2) (McKinney's 1983 and Supp. 1987). Because the refusal of the New York Court of Appeals to consider defendant's claim was based on defendant's failure to follow a state procedural rule that "unquestionably was well-established and reasonable," this Court is without jurisdiction to consider it. *Pennsylvania Railroad Co. v. Illinois Brick Co.*, 297 U.S. 447, 463 (1936); *see* 28 U.S.C. § 1257(3)

(1982 and Supp. 1987); R. Stern and E. Gressman, Supreme Court Practice 150-52 (6th Edition 1986).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

U.S. Const. Amendment XIV:

> No state shall . . . deprive any person of life, liberty or property, without due process of law. . . .

28 U.S.C. § 1257(3):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity . . . of a State statute is drawn in question on the ground of its being repugnant to the Constitution. . . .

N.Y. Crim. Proc. Law § 170.30:

> 1. After arraignment upon an information, a prosecutor's information or a misdemeanor complaint, the local criminal court may, upon motion of the defendant, dismiss such instrument or any count thereof upon the ground that:
>
> (a) It is defective, within the meaning of section 170.35 . . .
>
> 2. A motion pursuant to this section . . . should be made within the period provided by section 255.20.

N.Y. Crim. Proc. Law § 170.35:

> 1. An information, a simplified information, a prosecutor's information or a misdemeanor complaint, or a count thereof, is defective within the meaning of paragraph (a) of subdivision one of section 170.30 when:
>
> * * *
>
> (c) The statute defining the offense charged is unconstitutional or otherwise invalid.

N.Y. Crim. Proc. Law § 255.20:

> 1. Except as otherwise expressly provided by law, whether the defendant is represented by counsel or elects to proceed pro se, all pre-trial motions shall be served or filed within forty-five days after arraignment and before commencement of trial, or within such additional time as the court may fix upon application of the defendant made prior to entry of judgment. . . .
>
> * * *
>
> 3. Notwithstanding the provisions of subdivisions one and two hereof, the court must entertain and decide on its merits, at any time before the end of the trial, any appropriate pre-trial motion based upon grounds of which the defendant could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have been raised within the period specified in subdivision one of this section or included within the single set of motion papers as required by subdivision two. Any other pre-trial motion made after the forty-five day period may be summarily denied, but the court, in the interest of justice, and for good cause shown, may, in its discretion, at any time before sentence, entertain and dispose of the motion on the merits.

N.Y. Penal Law § 240.21:

> A person is guilty of aggravated disorderly conduct, who makes unreasonable noise or disturbance while at a

> lawfully assembled religious service or within one hundred feet thereof, with intent to cause annoyance or alarm or recklessly creating a risk thereof.
>
> Aggravated disorderly conduct is a class A misdemeanor.

STATEMENT OF THE CASE

On September 9, 1983, defendant disturbed Rosh Hashana services at a Jewish synagogue on East 7th Street in Brooklyn, New York. Running up and down the driveway between her mother's house and the synagogue, she shouted racial slurs and hurled threats into the synagogue. Among other things, she yelled at the assembled congregation:

> I'm sorry Hitler didn't finish his job! I would only be pleased to finish his job with these dirty Jews!

After a jury trial in the Criminal Court of the City of New York, County of Kings, defendant was convicted of Aggravated Disorderly Conduct (N.Y. Penal Law § 240.21), for intentionally or recklessly disturbing a religious service. She was sentenced to a Conditional Discharge on September 24, 1984.

Defendant filed a timely notice of appeal to the Supreme Court of the State of New York, Appellate Term for the Second and Eleventh Judicial Districts. On appeal, she argued that her guilt was not proved beyond a reasonable doubt, that the New York Penal Law section under which she was convicted is unconstitutionally vague, overbroad, and violative of the first amendment's prohibition on the establishment of religion, and that the misdemeanor information by which she was prosecuted was defective. Appellate Term rejected all these claims on their merits, affirming the judgment of the Criminal Court in a Memorandum Opinion dated March 26, 1986. One member of the three-judge panel, Justice Monteleone, dissented, arguing that the evidence was insufficient to prove defendant's guilt beyond a reasonable doubt. *People v. Ian-*

nelli, No. 85-31, slip op. (N.Y. Sup. Ct., Appellate Term, 2d and 11th Districts, March 25, 1986) (reproduced in petitioner's appendix).

Subsequently, defendant obtained leave to appeal to the New York Court of Appeals. *People v. Ianelli*, 67 N.Y.2d 1053 (1986). In the New York Court of Appeals, defendant repeated the arguments she had previously advanced before Appellate Term. The New York Court of Appeals heard oral argument on November 17, 1986 and on December 19, 1986, unanimously affirmed the judgment of the Appellate Term. The court rejected on their merits defendant's claims of reasonable doubt and insufficiency of the information. 69 N.Y.2d at 685. The court declined to reach defendant's claim that the law under which she was convicted is unconstitutional, on the ground that she had failed to preserve it for that court's review. Defendant never sought reargument in the New York Court of Appeals. The present petition was filed March 18, 1987.

REASONS WHY THE WRIT SHOULD BE DENIED

1. This Court Lacks Jurisdiction to Review Defendant's Untimely Filed Petition.

The Court's jurisdictional statute provides that the time for filing a petition for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by the rules of the Supreme Court. 28 U.S.C. § 2101(d) (1982 and Supp. 1987). The Court's Rules provide that a petition for certiorari in such a case must be filed within 60 days after the entry of judgment unless an extension is granted upon good cause shown. Sup. Ct. R. 20.1 (1984 and Supp. 1987). The New York Court of Appeals entered its judgment in this case on December 19, 1986, and no petition for rehearing was filed; hence, the sixty-day period expired on February 17, 1987. No extension was sought or obtained. The petition, filed March

18, 1987, is manifestly out of time and the Court therefore lacks jurisdiction to review it.[1]

2. This Court Lacks Jurisdiction to Review Defendant's Federal Constitutional Claims Because The Highest State Court Expressly Declined To Review Them In Light Of Her Failure To Follow Well-Established and Reasonable State Procedural Rules Regarding The Preservation of Questions For Appellate Review.

Defendant failed to raise her federal constitutional claims in the trial court. Accordingly, the New York Court of Appeals expressly held that as a matter of state law it was powerless to review them. Because the record shows that the New York Court of Appeals' decision to decline jurisdiction was made by application of a "well established and reasonable" state procedure, *see Pennsylvania Railroad Co. v. Illinois Brick Co.*, 297 U.S. 447, 463 (1936), applied in a manner calculated to "serve legitimate state interests," *see Henry v. Mississippi*, 397 U.S. 443, 447 (1965), and did not simply reflect an effort by the Court of Appeals "to thwart review of the constitutional issues," *see Ellis v. Dixon*, 349 U.S. 458, 463 (1955), this Court must conclude that the New York Court of Appeals correctly held that defendant's claims were never properly before it and

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[1] The petition cannot be rendered timely by treating it as an appeal under 28 U.S.C. § 1257(2), thereby taking advantage of the 90-day rule prescribed by 28 U.S.C. § 2101(d) and Sup. Ct. R. 11.1 and 12.1. First, defendant herself declined to seek the appeal remedy, instead electing to proceed via the certiorari route. Not only did she characterize her papers in this Court as a petition for certiorari, but she failed to file a notice of appeal in the New York Court of Appeals as required for one taking a timely appeal by Sup. Ct. Rule 11.1. Accordingly, she is bound by the 60-day rule applicable to her chosen remedy. *See* R. Stern and E. Gressman, Supreme Court Practice 302, n.2 (6th Edition 1986). Second, because the New York Court of Appeals expressly declined to reach defendant's constitutional claims, properly finding them unpreserved, her case may not be characterized as one in which the state court below has validated a state statute in the face of a federal constitutional challege. Her case, therefore, cannot qualify as an appeal under 28 U.S.C. § 1257(2). Accordingly, the 60-day rule applies to her petition and it is untimely.

that, therefore, this Court lacks jurisdiction to review them. *See* 28 U.S.C. § 1257(3) (1982 and Supp. 1987).

Defendant concedes that she failed to follow established state procedure for challenging her prosecution on constitutional grounds in the trial court. The New York Criminal Procedure Law is explicit that in order to raise such a challenge, a defendant must move to dismiss the misdemeanor information on the grounds of unconstitutionality of the statute charging the offense, within forty-five days after arraignment and before commencement of trial.[2] Defendant never made such a motion. It is also uncontroverted that the New York Court of Appeals explicitly declined to review defendant's constitutional claims because of her procedural default, in spite of the fact that her claims had been raised and decided in the intermediate appellate court and were fully briefed and argued in the Court of Appeals. *See People v. Iannelli*, 69 N.Y.2d at 685.

Defendant's argument for this Court's jurisdiction is thus based solely on the assertion that the New York Court of Appeals unreasonably applied the preservation doctrine simply in order to thwart review of her constituitional claims. In support of this assertion, defendant argues that the New York Court of Appeals ruled on the jurisdictional issue without briefing or argument by the prosecution below, that the Court of Appeals ignored its own prior precedents and decided the case contrary to New York law, and that the application of the preservation doctrine here was illogical and not warranted by any legitimate state interest. *See* Petition for Certiorari at 45-47, 49. Each of defendant's arguments must be rejected.

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2 Pursuant to N.Y. Crim. Proc. L. § 170.30(1)(a), defendant could have moved to dismiss the misdemeanor information on the grounds that it was "defective," a statutorily defined term which includes, among other things, cases in which "the statute defining the offense charged is unconstitutional or otherwise invalid," N.Y. Crim. Proc. L. § 170.35(1)(c). The dismissal motion must be made within 45 days of arraignment unless good cause is shown for untimeliness. N.Y. Crim. Proc. L. §§ 170.30(2); 225.20(1) and (3).

To begin with, the fact that the preservation argument was not advanced by the prosecution below is irrelevant to the resolution of the federal jurisdictional issue before this Court. That issue depends solely on this Court's evaluation of whether the New York Court of Appeals' procedural decision served any legitimate state interest. *See Chambers v. Mississippi*, 410 U.S. 284, 291 n. 3 (1973); *Street v. New York*, 394 U.S. 580, 583-84 (1969); *Henry v. Mississippi*, 379 U.S. 444, 447 (1965); *Ellis v. Dixon*, 349 U.S. 458, 462-63 (1955); *Williams v. Georgia*, 349 U.S. 375, 388-90 (1955); *Pennsylvania Railroad Co. v. Illinois Brick Co.*, 297 U.S. 447, 462-63 (1936); *Patterson v. Alabama*, 294 U.S. 600 (1935); *see also Chambers v. Mississippi*, 410 U.S. 294, 309 (1973) (Rehnquist, J., dissenting). Whether the Court of Appeals reached its decision based on briefing by the parties or upon a *sua sponte* evaluation of the procedural history of the case in light of applicable New York law can have no bearing on that inquiry.

Second, it is not correct that the Court of Appeals decided the jurisdiction issue before it in a manner contrary to New York law. Defendant is correct that the New York Court of Appeals overruled the holding implicit in its own prior decision in *People v. Bergerson*, 17 N.Y.2d 398 (1966), to the effect that a constitutional void-for-vagueness claim may be raised for the first time on appeal. She is also correct that the Court of Appeals elected not to apply to this case the occasionally-stated prior dictum that a claim of a "deprivation of a fundamental constitutional right" may be raised for the first time on appeal. *Cf. People v. Banks*, 53 N.Y.2d 819, 821 (1982) (no need to preserve claim of deprivation of right to counsel); *People v. Michael*, 48 N.Y.2d 1, 5-7 (1979) (no need to preserve double jeopardy claim because double jeopardy is "fundamental not only to the process of criminal justice but to our system of government itself"); *People v. Patterson*, 39 N.Y.2d 288, 295-96 (1976), *aff'd*, 432 U.S. 197 (1977) (no need to preserve claim that statute created a crime which need not be proved beyond a reasonable doubt); *People v. McLucas*, 15 N.Y.2d 167 (1965) (no need to preserve claim that court's instructions violated defendant's privilege against self incrimination). The mere fact

that the New York Court of Appeals has chosen to narrow the category of claims that may be raised for the first time on appeal, and therefore declined to extend the exception to the present case, does not make the present decision invalid as a matter of New York law. Indeed, in recent years the New York Court of Appeals has often stated that it will generally apply its preservation doctrine to constitutional claims as well as to ordinary claims of error. *See, e.g., People v. Dozier*, 52 N.Y.2d 781, 783 (1980) (unpreserved claim that statutory rape law violated due process and equal protection by eliminating *mens rea* requirement and discriminating on basis of sex); *People v. Martin*, 50 N.Y.2d 1029, 1031 (1980) (unpreserved claim that seizure violated defendant's rights under *Payton v. New York*, 445 U.S. 573); *People v. Thomas*, 50 N.Y.2d 467, 471 (1980) (unpreserved claim that jury instruction that a person ordinarily intends the natural and probable consequences of his acts shifted burden of proof); *People v. Drummond*, 40 N.Y.2d 990, 993 (1976) (defendant who never sought youthful offender status could not challenge constitutionality of eligibility requirements for such status); *People v. Robinson*, 36 N.Y.2d 224, 228 (1976) (unpreserved claim that ambiguous jury charge shifted burden of proof). These recent decisions make clear what the New York Court of Appeals had previously stated in *dicta*, *i.e.*, that the category of claims that may be raised for the first time on appeal is a "very narrow exception" applicable only where a defective procedure divested the court of jurisdiction, eliminated the right to trial by jury or created a fundamental nonwaivable defect in the mode of procedure. *People v. Patterson*, 39 N.Y.2d at 294; *see also People v. Thomas*, 50 N.Y.2d at 474 (Fuchsberg, J., concurring) (modern trend to narrow scope of exception to preservation requirement). The New York Court of Appeals applied its narrow rule here. *People v. Iannelli*, 69 N.Y.2d at 685, *citing People v. Dozier*, 52 N.Y.2d at 783; *People v. Thomas*, 50 N.Y.2d at 473, *and People v. Drummond*, 40 N.Y.2d at 990. Its decision was consistent with New York law.

Finally, it is clear that the decision of the Court of Appeals to require preservation of defendant's constitutional claims served a legitimate state interest. Preservation requirements, in the present case as elsewhere, not only promote full development of a record, but also serve the legitimate state interest of judicial economy. As the New York Court of Appeals stated in *People v. Patterson*,

> A defendant cannot be permitted to sit idly by while error is committed, thereby allow the error to pass into the record uncured, and yet claim the error on appeal. Were the rule otherwise, the State's fundamental interest in enforcing its criminal law could be frustrated by delay and waste of time and resources invited by a defendant.

39 N.Y.2d at 295. The same legitimate interest was served here. 69 N.Y.2d at 685. Any meritorious constitutional claim, if it had been asserted before trial in a timely manner pursuant to the Criminal Procedure Law, would have resulted in dismissal of the information and avoidance of the long and costly jury trial that was ultimately held.

Nor is it unjust in the present case to hold that defendant consciously waived or forfeited her constitutional claims by failing to raise them before trial. The entire record of the case, at trial and in the appellate courts, reflects a conscious effort on the part of defendant to characterize the incident in question as a harmless dispute between neighbors and to minimize its character as a racist, antisemitic outburst. In light of this record, there is every reason to believe that defendant, far from unknowingly missing a point of state procedure, in fact made a conscious decision as a matter of trial strategy, in her own interest, not to challenge the statute's constitutionality before trial, for the very purpose of securing for herself the forum of a Criminal Court courtroom in which to attempt to vindicate her version of the incident. It was only after the Criminal Court jury disagreed with her version of the events that she raised the issue of the law's constitutionality. This kind of belated challenge after completion of a long and costly trial on the merits, is precisely the sort of situation that preservation

requirements are designed to prevent. This is a legitimate state purpose. *See Henry v. Mississippi*, 379 U.S. at 447.

Thus, the Court of Appeals properly declined to review defendant's unpreserved claim. This Court, lacking jurisdiction, must do likewise.

3. Defendant's Claims That N.Y. Penal Law § 240.21 Is Unconstitutional Are Without Merit and Thus Not Worthy of the Court's Review.

Even if the Court had jurisdiction over the petition, the request for a writ should nevertheless be denied because the challenged statute is unquestionably constitutional and, thus, defendant's petition raises no issue worthy of the Court's review.

To begin with, N.Y. Penal Law § 240.21 cannot be unconstitutionally vague because a reasonable person, reading it, would know what it proscribes. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *U.S. v. Harriss*, 347 U.S. 612, 617 (1954). Nor does N.Y. Penal Law § 240.21 violate due process by punishing inadvertently disturbing behavior; the section is clear that a person must act recklessly or intentionally in order to run afoul of its proscriptions.

Defendant's claim of first amendment overbreadth is likewise meritless. Section 240.21 is narrowly tailored to its purposes: to preserve the peace, good order and comfort of the community and to protect the first amendment rights of all citizens to assemble and freely exercise their religion. To the extent that it limits freedom of speech, N.Y. Penal Law § 240.21 creates reasonable time, place and manner restrictions, which are constitutional. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Feiner v. New York*, 340 U.S. 315 (1951); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

Finally, the New York State legislature's decision to differentiate aggravated disorderly conduct from simple disorderly conduct by making it a misdemeanor instead of a violation is not an unconstitutional establishment of religion. Contrary to

defendant's claim, New York law does not "treat the disturbance of a religious service twenty-four times more severely than the disturbance of any other public assembly." (Petition for Certiorari at 32). Rather, it simply includes disturbance of religious services in the category of several forms of aggravated disorderly behavior that are punished as misdemeanors because, like the other aggravated forms, disturbance at a religious service causes more public and private harm than ordinary disorder.[3] Disturbing a religious service attacks the fundamental rights of others and offends New York's public policy of outlawing discrimination. This differentiation thus clearly has a valid secular purpose and effect and does not create excessive entanglement with religion. It is unquestionably constitutional. *Lemon v. Kurzman*, 403 U.S. 602, 612-13 (1971).

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3 In addition to disturbance of a religious service, New York also punishes, as misdemeanors, the following: disturbance of meetings other than religious services, if the actor disturbs the meeting because of the race, creed, color, national origin, sex, marital status or disability of the participants, *see* N.Y. Civil Rights L. §§ 40-c, 40-d; disturbances which interfere with polling places or other election-related activity, including meetings, *see* N.Y. Elect. L. §§ 5-204, 17-168; disturbances in violation of regulations established by not-for-profit corporations in charge of parks, playgrounds, cemetaries, buildings and grounds for camp and grove meetings, Sunday school assemblies, temperance, missionary, educational, scientific, musical or other meetings, *see* N.Y. Not-for-Profit Corp. L. § 202(d) and (e); and disturbance of court proceedings, *see* N.Y. Penal L. § 215.50(1) and (2).

CONCLUSION

DEFENDANT'S APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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May 18, 1987